

# Suitable degrees of separation

For victims of humanity's most horrific crimes, the International Criminal Court may provide at least some hope and relief in an unjust world. However, there are concerns over its impartiality, particularly in light of a recent decision that reparations from the Victims Trust Fund may be allocated in advance of the Court's judgment. DOUGLAS MCNABB and C J DRESDEN argue that in pursuing civil justice, the criminal judicial process must not also become a victim

**A**rguably the hottest topic of debate at the International Criminal Court (ICC) Fourth Assembly of States Parties in The Hague this winter was the status of the Court's Victims Trust Fund and how to administer its resources. Ultimately, the General Assembly of the States Parties to the ICC decided that the fund's independent governing board will have the discretion to allocate funds, but that the Court will have a right of review for the purpose of ensuring that neither the judicial process nor rights of the defendants are adversely affected. Although the solution appears to be a reasonable compromise for both sides, and serves the purpose of unfreezing the fund, this 'administrative' matter is not, and should not be, dismissed lightly.

The debate at the Fourth Assembly of States Parties was divided into two main schools of thought on the issue of how and when the trust fund resources should be administered. One side was led by Britain, Canada and Australia – three

Delegates argued that the fund should be administered by the Court only after a finding of guilt or innocence in the relevant case(s). This plan would place the responsibility for releasing funds in the hands of judges who presumably have the best interests of the judicial process in mind. Criteria for assigning aid and reparations would include defendants' rights, judicial independence, judicial finality and other core judicial principles. The disadvantage of this approach is that it runs the risk of missing crucial opportunities to save lives and communities. Fortunately, the ICC is not the sole entity engaged in providing humanitarian aid to disadvantaged regions and people of the world.

On the other side were proponents of a process that would allow the board to funnel aid to affected people and regions immediately upon report of alleged criminal activity or human need. As such, the aid would be used directly and immediately for the individuals and areas most severely affected

several civil law countries – France, Belgium and a number of African nations – and human rights non-governmental organisations (NGOs). The undisputed benefit of this process is its sensitivity to the reality that time is usually of the essence in situations where an oppressive, vicious, or inhumane regime wields power. By the time the slow, deliberate wheels of justice have turned, these parties argue, the moment for preventing or ameliorating further human damage may have passed.

The greatest disadvantage to the 'help-when-help-is-needed' school of thought is that it establishes and names victims in advance of making legal and factual determinations that the alleged crimes took place. It confuses the humanitarian idea of victim with the legal category of witness and causes evidence of crimes to be fabricated through the Court's own administrative acts.

It should be noted that it has been the practice of the United Nations *ad hoc* tribunals to include a budget designated for victim support services that is also administered through a branch of the Registry – the administrative and managerial arm of the Court. However, these funds have been used primarily for the education and protection of individuals who became testifying material witnesses in legal proceedings. The use of a tribunal to make determinations as to reparations for victims – let alone to allocate compensation in advance of judgment – is without precedent.

The ICC Victims Trust Fund was established in September 2002 by the States Parties to the Rome Statute as an independent trust to be held by the Court in the interests of people and communities affected by war crimes and crimes against humanity. The rights of victims and the procedures for addressing these rights at the

Statute and in the ICC Rules of Procedure and Evidence. The fund is administered by a board of five directors, each elected by the States Parties for a term of three years. Currently, the board includes South African Archbishop Desmond Tutu, former French health minister Simone Veil and Jordan's Queen Rania.

Formally, the fund falls within the authority of the Victims Participation and Reparation Unit. This in turn sits within the Registry, which also has responsibility for administering all other legal aid functions, including defence counsel, and serves as the channel of communication between the Court and states, inter-governmental organisations (IGOs), and NGOs. Even though its responsibility is purely administrative, if the Registry should find itself in a position of conflicting interests, there is a risk that the decisions it makes in the best interests of the Court could well affect separate parties differently – and could bear upon the judicial integrity and independence of the Court.

The Rome Statute is unique in that it provides avenues for alleged victims of crimes against humanity, war crimes and genocide to participate widely in Court activities – in pre-indictment investigations, pre-trial matters, at trial, sentencing and at appeal. This scope of access to the legal process for individuals whose declared status as 'victim' is the subject of material dispute before the Court is innovative in the world of international criminal law. Once accorded victim status, the individual or community has both the right and the financial support of the Court, according to the Rome Statute and the Rules of Procedure and Evidence, to provide information that assists the Court at the pretrial phase – in the investigation of targeted individuals, in determining admissibility of the case and in determining the Court's own

competence to hear the case. Should the case be brought before the ICC, the same individuals and groups are supported in presenting that and other evidence in open court. Additionally, in a quasi-civil legal right, victims are assisted in petitioning the Court for reparations

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that may include restitution, indemnification and rehabilitation. The trust fund may be applied to payment of victims' attorneys' fees throughout the process.

Individuals and entities petitioning to participate are required to present evidence that they are victims of the 'crimes' that are subject to the judicial process in question. It is chilling that the Court does not see a conflict between this criterion for participation and its professed belief in the presumed innocence of each defendant (Rome Statute article 66) and the rights of the accused (article 67). The Reparation Unit also has wide discretion to use all possible means for publicising proceedings before the Court, including requests for government co-operation, petitions for aid from NGOs and communications to local media. According to the rules, this right to

disseminate information falls under the unit's charge to provide adequate notice to all participants in a case before the Court. However, presentation of that information is virtually unfettered and is by its nature in the interests of a party to the case in dispute.

The funds that support the Victims Trust come from several sources – such as contributions of States Parties, NGOs (including the United Nations), as well as others. Eventually, the reparations assessed in the sentencing phase of cases heard before the Court will flow to victims through the trust as well. The general rule is that the Court may authorise individual or collective reparations after a person is found to be guilty of the crimes alleged in the indictment. However, under the 2005 compromise plan, the board may

authorise the release of funds to affected communities – either directly or by way of an IGO or NGO – before a case is heard in the matter or even before an indictment is brought.

For all of these reasons, there is a clear risk that by becoming an insurer of human suffering, the impartiality of the ICC – a judicial tribunal created to consider and accord justice in the face of the most grave acts of criminal conduct, deeds that are no less than offences to all of humanity – will be severely compromised. The sheer number of reparation cases active today in civil law courts around the world with regard to victims of holocausts perpetrated during the previous century, clearly indicates a need for more effective reparation processes. However, there is an equally great necessity for a degree of separation between those civil justice goals and the international criminal justice process. ■